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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

GARLAND DENTY,

PETITIONER,

v.

SMITHKLINE BEECHAM CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act, 43 Pa.C.S. § 951 et seq., are applicable to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, Pennsylvania, in the employ of a United States subsidiary controlled by a foreign parent corporation not itself controlled by an American corporation, where the promotional opportunity is a position with the foreign corporation outside the United States?

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PETITION FOR WRIT OF CERTIORARI

Garland Denty ("Denty") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in these proceedings on March 17, 1997, involving an important question of federal law which has not been but should be settled by this Court, and on which the appellate court's decision conflicts with relevant analogous decisions of this Court and other Courts of Appeal.

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OPINIONS BELOW

The March 17, 1997 opinion of the United States Court of Appeals for the Third Circuit is reprinted in the Appendix at App. A-1 to A-9. The opinion of the District Court is set forth in *Denty v. SmithKline Beecham Corp.*, 907 F.Supp. 879 (E.D.Pa. 1995), reprinted at App. A-10 to A-20. Denty sought and was granted permission to appeal from that decision on a certified question pursuant to 28 U.S.C. § 1292(b). The District Court's May 10, 1996 order granting Denty's

motion for certification to allow an interlocutory appeal is reprinted at page App. A-21 to A-22. The decision of the United States Court of Appeals for the Third Circuit granting Denty' petition for permission to appeal from the certified interlocutory order, granted on June 21, 1996, is reprinted at page App. A-23 to A-24. The Question Presented for Review to this Court is identical to the question certified for review below.

JURISDICTION

The Court of Appeals entered its judgment on March 17, 1997. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the order of which review is sought. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

> individual's age[ ]. . .

29 U.S.C. § 623(a).

The Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C..S. § 951 *et seq.*, likewise provides in pertinent part:

> It shall be an unlawful discriminatory practice . . . For any employer because of ... age ... to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment ....

43 Pa.C.S. § 955(a).

Denty submits that the 1984 amendments to the ADEA are not relevant to his claim, because he was at all times employed in the United States. However, because the District Court and the Court of Appeals relied upon those amendments, they are reproduced as follows:

First, the definition of "employee" was expanded to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Second, at the same time, Congress also enacted § 623(h):

> **Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control**

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person[1] not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the

(A) interrelations of operations,
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership or financial control,

of the employer and the corporation.

29 U.S.C. § 623(h).

The PHRA is silent as to the territorial limits of its reach.

Statement of the Case

On December 23, 1993, Denty filed a Complaint in the United

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[1] "The term person means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 630(a)

States District Court for the Eastern District of Pennsylvania against his employer, SmithKline Beecham Corp. ("SB Corp"), a Pennsylvania corporation, alleging violations of both the ADEA and the PHRA. Denty alleged that he was discriminated against by being denied several promotional opportunities due to his age, and that later he was retaliated against after he filed his charge of discrimination. Jurisdiction in the District Court over the ADEA claims for discrimination and retaliation was invoked pursuant to 28 U.S.C. §§ 1331 and 1337. Jurisdiction over the corresponding PHRA claims was based upon 28 U.S.C. § 1367.

SB Corp is a wholly owned subsidiary of SmithKline Beecham, Plc ("SB Plc"), which is a corporation organized under the laws of the United Kingdom. The pharmaceuticals business of the company ("SB Pharmaceuticals"), in which Denty worked, crosses these corporate lines, and functions as a unified corporate division in England, in the United States and elsewhere insofar as operations, management, labor relations, and financial controls are concerned. The American subsidiary is controlled by its English parent. *Denty v. SmithKline*

Beecham Corp., 907 F.Supp. at 886, App. A-19.

Denty was the Director of Manufacturing Operations/Technical Services, International in Worldwide Technical Operations for SB Pharmaceuticals. He was employed in Philadelphia. Although he was technically an employee of SB Corp., he reported directly to senior executives who were technically employed by SB plc.

In August, 1992, Worldwide Technical Operations was reorganized. As a result of this reorganization, four new positions were created which represented promotional opportunities for Denty, for which he was qualified. Three of these positions were to be based in the United Kingdom, where the position holder would be an employee of SB plc. The fourth position was to be located in Australia, where the position holder would be either an employee of SB plc or some other SmithKline Beecham corporation other than SB Corp. Denty was passed over for promotion, while each of these positions was filled by other, significantly younger individuals who were, Denty submits, less qualified and had less experience. Denty alleges that he was passed over for promotion because of his age.

On August 4, 1995, SB Corp moved for summary judgment on Counts I and III of the Complaint (Denty's claims for age discrimination under the ADEA and PHRA respectively).[2] On November 7, 1996, the Court granted SB Corp's motion for summary judgment, holding that neither the ADEA nor the PHRA applied to a decision by a foreign corporation about whether or not to *promote* an employee *working in the United States* to a position in a foreign country.[3]

The District Court accepted the settled law that "the site of the

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[2] Counts II and IV, not here in issue, asserted the retaliation claims.

[3] The District Court also found the distinction between SB Corp. and SB plc in terms of who had been Denty's technical employer not to be an issue. SB Corp had argued that it was entitled to summary judgment because Denty had not named the proper defendant, SB plc. However, the District Court made it clear that if it were, at that late date, to allow SB Corp to raise the defense that it was not the proper party, it would also allow Denty to amend his Complaint to join SB Plc. What was important to the District Court, and to the Court of Appeals, was that the controlling entity was a foreign corporation. This is clearly reflected by the fact that the question certified for review by both courts phrased the issue as one of *promotion,* not of new hire.

workplace determines the applicability of the ADEA," but then ruled that "the relevant work site is the location of [the position for which the plaintiff applied], not the location of Denty's employment at the time of the alleged discrimination." The District Court also held that the ADEA does not distinguish in this regard between claims for failure to hire and failure to promote. *Denty v. SmithKline Beecham Corp.*, 907 F.Supp. at 884, App. A-16 - A-17.

The matter was then presented to the Court of Appeals on Denty's petition for permission to appeal from the certified interlocutory order. The petition was granted, the appeal briefed and argued, and the Third Circuit affirmed the District Court's decision.

The Court of Appeals held, relying upon the 1984 amendments to the ADEA, that "the ADEA does not apply when a foreign corporation controls an American corporation and the employment is with the foreign parent abroad."[4] App. A-9. In so holding, the Court

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[4] The Court of Appeals held that the PHRA claim must also be dismissed as "no evidence exists to show the Pennsylvania legislature intended to apply the PHRA to employment decisions made by foreign corporations for

(continued...)

of Appeals determined that the relevant work site for ADEA purposes was the site of the position to be filled, and that the ADEA did not distinguish between failure to hire and failure to promote situations in this regard. App. A-7, at fn 5.

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REASONS FOR GRANTING THE WRIT

I. When an individual is employed in the United States, the question of whether the opportunity to be promoted is a "term, condition or privilege" of current employment which is protected by federal laws against employment discrimination even if the employer is a foreign corporation and the promotion will be to a position in a foreign land, is an important question which has not been, but should be, settled by the Supreme Court.

More and more of America's workers are employed by foreign corporations, or by domestic corporations controlled by foreign parents. This case thus raises the important issue of the reach of this nation's equal employment opportunity laws against the backdrop of the increasing globalization of commerce by multinational corporate employers. Consideration for promotion is unquestionably a term,

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[4](...continued)
positions located outside the United States." App. A-9.

condition or privilege of employment, which may not in this country be doled out in a discriminatory fashion. The question of whether a foreign employer is exempt from the ADEA merely because the work site of the promotional opportunity is outside the United States is of great significance to every employee who hopes to work his or her way up the corporate ladder. *In addition, because Title VII of the Civil Rights Act of 1964 contains the same language as the ADEA, see 42 U.S.C. § 2000e-1(c), this case presents an issue which transcends the question of age discrimination, and potentially impacts every employee who has been the victim of discrimination based upon race, color, religion, sex, national origin or disability as well.*

Neither this Court nor any other Court of Appeals has addressed the precise question presented here. Nevertheless, this case is uniquely suited to be the one in which the issue is decided. The facts are simple and straightforward. Whether or not age was a determinative factor in the decision not to promote Denty is not contested by defendant at this stage of the proceedings. This matter is before the Court on a motion for summary judgment and defendant has not contended that there is

insufficient evidence from which a jury could conclude that age was a determinative factor. The courts below have also concluded that there is sufficient evidence from which a jury could conclude that this was a true promotional opportunity, not a new hire situation. There are no other issues to clutter the record or deflect anyone's focus. Even the issue itself has already been framed by the courts below.

Finally, as will be shown below, it is important for the Supreme Court to settle this question because the Court of Appeal's decision materially conflicts with the language of the ADEA, and its reasoning cannot be squared with, and tends to undermine, the logic underlying decisions of this Court and other Courts of Appeal.

II. The logic of the decision of the Third Circuit that, when a foreign corporation denies a promotion overseas to an individual employed by it in the United States, it is free to base that decision on the employee's age, conflicts with relevant decisions of the Supreme Court and of other United States Courts of Appeal.

The Third Circuit was able to reach its conclusion that, when a foreign corporation denies a promotion overseas to an individual employed by it in the United States, it is free to base that decision on the employee's age, only because it first decided that, for the purpose

of determining the territorial applicability of the ADEA. the relevant work site is where the individual will be located after promotion. It was able to make that decision, in turn, only because it held that the ADEA does not distinguish between failure to hire and failure to promote situations. App. at A-7, fn 5. It was able to so hold only by completely ignoring this Court's decision in *Hishon v. King & Spalding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), a case upon which Denty relied heavily in his brief to the Third Circuit. In *Hishon*, the Supreme Court considered the failure to promote a female associate attorney to partnership in a law firm, allegedly based upon her sex.[5] This Court drew a clear distinction between initial hiring and opportunity for promotion in footnote 5 of its Opinion:

> Title VII also may be relevant in the absence of an existing employment relationship, as when an employer *refuses* to hire someone.... However, discrimination in that circumstance does not concern the "terms, conditions, or privileges of employment," which is the focus of the present case.

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[5] Advancement from the status of associate to that of partner in a law firm is, without question, a promotion. *Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 983 F.2d 509, 522-31, *passim,* (3d Cir. 1992).

467 U.S. at 74, 104 S.Ct. at 2233.[6] The Court continued:

> The contractual relationship of employment triggers the provision of Title VII governing "terms, conditions, or privileges of employment." Title VII in turn forbids discrimination on the basis of "race, color, religion, sex, or national origin."

Id. at 74, 104 S.Ct. at 2233. Following that logic to its inevitable conclusion, the Court, in holding that plaintiff had stated a cause of action under Title VII, stated:

> [a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion .... Those benefits that comprise the `incidents of employment,' ... or that form `an aspect of the relationship between the employer and employees,' ... may not be afforded in a manner contrary to Title VII.

467 U.S. at 75-76, 104 S.Ct. at 2234 (citations omitted).

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[6] Of course, Title VII precedent may be relied upon in construing the substantive provisions of the ADEA, since those substantive provisions "were derived in haec verba from Title VII." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), citing *Lorillard v. Pons,* 434 U.S. 575, 584 n.12, 98 S.Ct. 866, 872 n.12, 55 L.Ed.2d 40 (1978). Pennsylvania courts also uniformly hold that the PHRA should be interpreted consistent with Title VII and the ADEA. *See, Jacques v. Akzo International Salt, Inc.,* 422 Pa.Super. 419, 421, 619 A.2d 748 (1993).

In short, the right of an individual employed in the United States to equal consideration for promotion is a "term, condition or privilege of employment" protected by equal employment opportunity laws, including the ADEA. Therefore, application of the ADEA, or any other federal law governing employment discrimination, to a claim by an individual employed in the United States, who alleges discrimination in the terms and conditions of his employment, does not *by definition* involve extraterritorial application. It is, rather, consistent with settled law and traditional ADEA and Title VII analysis that the site of the employee's workplace **at the time of the discriminatory decision** is what determines whether American discrimination laws apply. See, *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984); *DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C.Cir. 1985); *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984); *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984); *Wolf v. J.I. Case Co.*, 617 F.Supp. 858 (E.D. Wisc. 1985); *Belanger v. Keydril Co.*, 596 F.Supp.

823 (E.D.La. 1984).

That the effect of the promotion might be to place the individual in a position where he or she is no longer protected by the ADEA or Title VII just is not a relevant consideration. What is relevant is the protected status of the individual at the time of his or her application for the promotion sought. *Hishon,* 476 U.S. at 74-6, 104 S.Ct. at 2233-34.

The Third Circuit cited the decision of the Eleventh Circuit in *Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987) as "indistinguishable" from the present case. App. A-7, footnote 5. In fact, however, the Third Circuit's decision directly conflicts with the logic underlying *Lopez.* In *Lopez*, which involved facts arising prior to the 1984 amendments, the plaintiff applied in the United States to a domestic company for *initial* employment in Caracas, Venezuela. Noting that application of the ADEA depended upon the site of the employee's work place, the court in *Lopez* distinguished a long line of established precedent[7] on the basis that the plaintiffs in those cases, like

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[7] *DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282; *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121; *Pfeiffer v. Wm.*

(continued...)

Denty, were already employees of the defendants and had existing work stations when they were the victims of allegedly discriminatory conduct. It was only because the plaintiff in *Lopez* had no existing workstation that the Eleventh Circuit concluded it should look to the site of the *anticipated* work station to determine the applicability of the *ADEA*. It did this in order to be consistent with the established "situs of the work station rule" and to avoid the rejected "place of decision" concept. *Lopez*, 813 F.2d at 1119.

The Third Circuit's decision also directly conflicts with the logic underlying the decision of the Tenth Circuit in *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984). In that case, also involving facts which arose prior to the 1984 amendments, the ADEA was found inapplicable to an employee denied a *transfer* from a position overseas to a position in the United States, because the situs of his present workplace, not his prospective workplace, controlled. In

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[7](...continued)
Wrigley, Jr. Co., 775 F.2d 554; *Cleary v. United States Lines, Inc.*, 728 F.2d 607; *Zahourek v. Arthur Young & Co.*, 750 F.2d 827; *Thomas v. Brown & Root, Inc.*, 745 F.2d 279.

dicta, the Tenth Circuit noted that it would have applied the ADEA if the employee were being transferred from a position within the United States to a position in a foreign country, precisely Denty's situation.

The lower courts' decisions in this case thus cannot be reconciled with the Eleventh Circuit decision in *Lopez*, the Tenth Circuit's decision in *Zahourek* or this Court's decision in *Hishon.* They operate to deny the protection of equal employment opportunity laws to individuals working in the United States for foreign employers on the grounds that their new status, if promotion were granted, would take them out of the protected class, in direct contravention of both precedent and legislative intent.

Also of concern is the fact that, to support their decision in this case, the courts below have turned the 1984 amendments to the ADEA on their head. Those amendments expanded the scope of the ADEA by extending the reach of the statue to American citizens employed overseas by American employers or by entities controlled by American employers. Thus, the prospective employee of the American corporation in *Lopez* would have been protected even though his job

posting would have been in Venezuela, and the employee of the American employer in *Zahourek* who sought a transfer from overseas back to the United States would have been protected as well. The amendments were never intended to *restrict* the reach of American employment discrimination laws in the fashion adopted by the Court of Appeals here. *Helm v. South African Airways*, 44 Fair Empl. Prac. Cas. (BNA) 261, 43 Empl. Prac. Dec. (CCH) ¶37,303 (S.D.N.Y. 1987).

To the extent this Court does not review the decision below, the Third Circuit's decision will provide logical support for future restrictions on the protections afforded American employees by the ADEA and Title VII. This Court should reemphasize that the 1984 amendments to the ADEA are irrelevant to individuals whose work stations are within the territorial jurisdiction of the United States.

III. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Filed March 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1554

GARLAND DENTY,
Appellant

v.

SMITHKLINE BEECHAM CORPORATION;

(Caption amended per the Clerk's 7/22/96 order)

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 93-cv-06978)

Argued
February 6, 1997
Before: STAPLETON and MANSMANN, *Circuit Judges*
and RESTANI, *Judge*.*

(Filed March 17, 1997)

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Before us is the certified question of whether the Age Discrimination in Employment Act and the Pennsylvania

Human Relations Act are applicable to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, Pennsylvania, in the employ of a United States subsidiary controlled by a foreign parent corporation not itself controlled by an American corporation, where the promotional opportunity is a position with the foreign corporation outside the United States. Because we do not believe Congress intended the ADEA should be applied extraterritorially under the facts here, we will affirm the judgment of the district court.

I.

The relevant facts on summary judgment are not disputed. In 1984, Garland Denty was hired by Smith Kline French, a Pennsylvania corporation, as Director of Quality Assurance. Denty held this job until January 1989, when he was given the title, Director of Manufacturing Operations/Technical Services, International. Denty held these positions at Smith Kline's Philadelphia office. Smith Kline subsequently merged with the Beecham Group plc, a British corporation in 1989; the resulting corporation, SmithKline Beecham plc (SB plc), is incorporated and headquartered in the United Kingdom. Denty continued working for SmithKline Beecham Corporation (SBC), the wholly-owned American subsidiary of SB plc.

As a consequence of the merger, five new positions were created with SB plc in foreign locations. Denty alleges that in 1990, he was told he would be promoted to one of these positions. Yet, he was subsequently denied the promotion allegedly because of his age which, at that time, was fifty-two. Denty further contends that these positions were filled with men younger than he. The promotion decisions were made by SB plc executives in England while Denty worked for SBC in Philadelphia.

On December 27, 1993, Denty instituted the present action against SBC,[1] alleging violations of the ADEA and

1. The district court considered whether SBC was the proper defendant. The court resolved the issue by ruling that it would allow Denty leave to amend his complaint to name SB plc as a defendant if it did not rule against him on SBC's summary judgment motion. *Denty v. SmithKline Beecham Corp.*, 907 F.Supp. 879, 881-82 (E.D.Pa. 1995).

PHRA for failure to promote, deprivation of employment opportunities, and age discrimination. Thereafter, SBC filed a motion for summary judgment, arguing *inter alia* that the ADEA did not apply to Denty's failure-to-promote claim. The district court granted summary judgment for SBC on the failure-to-promote claim. In so doing, the district court found that the statutory language of the ADEA, and by extension the PHRA, did not provide for extraterritorial application of the Act against a foreign corporation for failure to promote to positions outside of the United States. The court specifically ruled that "[t]he relevant work site is the location of [the position for which the plaintiff applied], not the location of Denty's employment at the time of the alleged discrimination." *Denty v. SmithKline Beecham Corp.*, 907 F.Supp. 879, 884 (E.D. Pa. 1995). The court further opined that there was no distinction in the ADEA between a "failure to hire" case, in which the discrimination occurs in the country where the job site is located, and a "failure to promote" situation. *Id.* Finally, the district court rejected Denty's contention that SBC and SB plc were indistinguishable and should be considered as a "single employer," holding instead that the proper inquiry was "whether Denty sought employment with an employer 'controlled' by an American firm." *Id.* at 885.

Denty then moved for certification to allow an immediate appeal pursuant to 28 U.S.C. § 1292(b), which the district court granted on May 10, 1996. The question certified for appeal is:

> whether the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act are applicable to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, PA, in the employ of a foreign corporation not controlled by an American corporation, where the promotional opportunity is a position with that same foreign corporation outside the United States?

Denty petitioned for permission to appeal under 28 U.S.C. § 1292(b) from a certified interlocutory order of the district court. We granted Denty's motion on June 21, 1996.

We review the district court's grant of summary judgment de novo. *Antol v. Perry*, 82 F.3d 1291, 1294-95 (3d Cir. 1996).

II.

We begin our analysis with the longstanding principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). The Supreme Court stated that in applying this rule, courts should determine if the "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). If Congress wishes to go beyond the purely domestic realm, there must be an "affirmative intention . . . clearly expressed." *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). We turn, therefore, to the plain language of the ADEA.

Codified at 29 U.S.C. § 623(a), the ADEA states in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[ ] . . . .

Prior to 1984, the ADEA did not contain any provision addressing extraterritorial reach. Instead, the ADEA adopted language from the Fair Labor Standards Act, 29 U.S.C. §§ 216(d) and (e), which provided that no "employee whose services during the workweek are performed in a workplace within a foreign country" was protected. Consequently, we held in *Cleary v. United States*, 728 F.2d 607, 610 (3d Cir. 1984), that the ADEA could not be applied to Americans employed outside the United States by American employers.

In 1984, Congress responded to *Cleary* and subsequent

cases[2] by amending the ADEA to provide for limited extraterritorial application. First, Congress amended the definition of "employee" to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Second, Congress enacted the key provision in this case, 29 U.S.C. § 623(h),[3] which states:

> **Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control**
>
> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.
>
> (2) The prohibitions of this section shall not apply where the employer is a foreign person[4] not controlled by an American employer.
>
> (3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—
>
> (A) interrelation of operations,
>
> (B) common management,
>
> (C) centralized control of labor relations, and
>
> (D) common ownership or financial control,

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2. *See, e.g., Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987); *S.F. DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984); *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984).

3. This subsection was originally codified as 29 U.S.C. § 623(g), creating the incongruity of two subsection "g's." This mistake was remedied by a 1986 amendment.

4. "The term 'person' means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 630(a).

of the employer and the corporation.

As the Supreme Court noted in *Arabian*, "[t]he expressed purpose of these changes was to 'mak[e] provisions of the Act apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries.' " 499 U.S. at 259 (quoting S. Rep. No. 98-467, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 2975).

Viewing the 1984 amendments together, the district court here concluded that the "ADEA applies abroad only when (1) the employee is an American citizen and (2) the employer is controlled by an American employer." 907 F.Supp. at 883. Our reading of the plain language of the statute compels us to agree.[5] The legislative history likewise necessitates this conclusion:

> The purpose behind the amendment is to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the [ADEA]. When considering this amendment, the Committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens

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5. As the district court noted, the employment decisions at issue involved Denty's application for positions in the United Kingdom and Australia. The relevant work site for ADEA purposes, therefore, is the location of these positions. We find support for this conclusion in the fact that the language of the ADEA does not distinguish between failure to hire and failure to promote situations. Accordingly, we find *Lopez v. Pan Am World Servs., Inc.*, 813 F.2d 1118 (11th Cir. 1987), indistinguishable from the case before us. Nor does the Tenth Circuit's decision in *Zahourek v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984), inform our decision here. There, the court of appeals held that the ADEA did "not apply to the termination of employment of an American citizen by an American employer where, as here, the 'workplace' is Honduras." *Id.* at 828-29 (footnote omitted). The 1984 amendment to the ADEA, without reference to where the discriminatory effect occurred, now specifically protects a person in Zahourek's position: an American citizen working for an American company abroad. Indeed, the focus of the amendment is now upon the degree of control exercised by an American company over the conduct of the discriminating corporation.

> of the United States who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by U.S. firms. Moreover, it is the intent of the Committee that this amendment not be enforced where compliance with its prohibitions would place a U.S. company or its subsidiary in violation of the laws of the host country.[6]

S. Rep. No. 98-467, at 2, *reprinted in* 1984 U.S.C.C.A.N. at 3000-01. We emphasize that the job for which Denty applied is in the United Kingdom with the parent company, not in the United States with the subsidiary.

The EEOC guidelines, promulgated in response to the 1984 amendments, do not convince us otherwise. The guidelines provide that "the ADEA does not apply to foreign firms operating outside the United States, unless those firms are controlled by U.S. employers. On the other hand, the ADEA does apply to foreign firms operating on U.S. soil." EEOC Policy Guidance, N-915.039, Empl. Prac. Guide (CCH) 5183, 6531 (March 3, 1989). Here the record is clear that Denty is currently employed by a U.S. subsidiary of a British parent corporation. SB plc controls the American subsidiary, not the other way around. Clearly, then, the ADEA cannot be applied extraterritorially to create liability on the part of SB plc given the facts of this case.

We reject the EEOC's argument that by failing to apply the ADEA extraterritorially here, Denty will fall into a "black hole." To the contrary, Denty does not fall into a "black

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6. The Committee codified their intent at 29 U.S.C. § 623(f), which reads in pertinent part:

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsection[ ] (a) . . . where such practices involve an employee in a workplace in a foreign country, and compliance with such subsection[ ] would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located[.]

This section has been commonly referred to as the "foreign law exception."

hole"—he is protected by British law. The fact that British law does not protect individuals forty years of age or older from discrimination is not our concern. Moreover, Congress considered the possibility of a "black hole" and yet chose not to extend the ADEA, recognizing the well-established principle of sovereignty. The EEOC's argument, thus, misses the mark.

The language of section 623(h)(2) could not be more clear —the ADEA does not apply when a foreign corporation controls an American corporation and the employment is with the foreign parent abroad. Accordingly, we will affirm the judgment of the district court.[7]

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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7. Denty's failure-to-promote claim under the Pennsylvania Human Relations Act (PHRA) must likewise be dismissed as no evidence exists to show the Pennsylvania legislature intended to apply the PHRA to employment decisions made by foreign corporations for positions located outside the United States.

GARLAND DENTY, Plaintiff
v.
SMITHKLINE BEECHAM CORP., Defendant

CIVIL ACTION NO. 94-6978

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

907 F. Supp. 879;
1995 U.S. Dist. LEXIS 16831;
69 Fair Empl. Prac. Cas. (BNA) 376
November 7, 1995, FILED, ENTERED

OPINION

Plaintiff Garland Denty alleges that defendant SmithKline Beecham Corporation (SBC) denied him promotions due to his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Pennsylvania Human Relations Act (PHRA), 43 Pa. C.S.A. §§ 951-963. Plaintiff also alleges that the defendant violated the ADEA and the PHRA by "creating intolerable working conditions for Plaintiff because of his age and because he filed a complaint of discrimination." Complaint, P 33. SBC has moved for summary judgment on the failure-to-promote claims. Defendant's primary contention is that the extraterritorial application of the ADEA and the PHRA do not reach this case because the positions plaintiff sought were located outside the United States for an English company.

I. Factual Background

In 1984, Garland Denty was hired by Smith Kline French, a Pennsylvania corporation, as Director of Quality Assurance, a job he held until January 1989, when he was given the title Director of Manufacturing Operations/Technical Services, International. Denty performed these jobs at SmithKline's offices in Philadelphia. In April 1989, SmithKline merged with the Beecham Group plc., a British corporation. The resulting company was called SmithKline Beecham plc (SB plc). According to its 1994 annual report, filed with the SEC, SB plc is organized under the laws of England,

and its headquarters are located in Brentford, Middlesex, England. Plaintiff's Ex. 21, at 1. The defendant, SBC, is the American branch of SB plc. It is a wholly-owned subsidiary of SB plc.

A great deal of reorganization followed the merger, including the creation of certain new positions. According to plaintiff, in 1990, he was told that he would be promoted to Vice-President of Technical Services/Plant Operations. Later that year, however, plaintiff allegedly was informed that he would not be promoted to this position because of his age. At the time, plaintiff was 52 years old. Plaintiff claims that in 1992 he applied for four other positions at the vice-president level -- the exact job titles do not appear in plaintiff's complaint -- and that he was denied these positions on the basis of age. Plaintiff alleges that all these positions were filled by men younger than himself.

The promotion decisions at issue in this case were made by SB plc executives in England, while Denty worked for SBC in Philadelphia. It is undisputed that all the positions Denty sought were based outside the United States. [8]

II. Whether SBC Is the Proper Defendant

Defendant argues that Denty has sued the wrong party. SBC has produced uncontradicted evidence that all the positions Denty sought were with SB plc, the English corporation which is the parent company of the defendant, SBC. Denty argues, however, that SBC has waived this argument by failing to plead it as an affirmative defense. Denty further argues that SBC is estopped from making this argument because, in its answer, SBC in effect admitted that it was the proper defendant. Denty has indicated that if SBC has not waived this argument, or if SBC is not estopped from making it, Denty would seek leave to amend his complaint to add SB plc as a defendant.

Denty's waiver argument is based on his assertion that "the defense that plaintiff has sued the wrong party is an affirmative defense" that is

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[8] According to defendant, four of the five positions were located in England, and the fifth was located in Australia. Plaintiff neither confirms nor denies the locations of these jobs but acknowledges that they all would have been performed outside the United States.

waived if not pled in the answer. Plaintiff's Mem. at 26. Denty bases his estoppel argument primarily on a series of statements in defendant's answer, which acknowledge that following the merger of SmithKline Beckman and the Beecham Group, a reorganization occurred. In the answer, defendant stated that "SmithKline" -- defined earlier in the answer as SBC -- was responsible for the reorganization. According to Denty, the reorganization included filling the positions Denty sought and which he allegedly was denied because of his age. Thus, Denty argues, SBC has admitted that it -- not SB plc -- is the entity that made the allegedly discriminatory decisions. Moreover, Denty further asserts that throughout this litigation, which included proceedings before the Pennsylvania Human Relations Commission, the defendant never distinguished between SBC and SB plc, but instead responded to Denty's allegations as if it were the correct party. Having affirmatively "admitted" that it is the correct party, and having failed to distinguish itself from SB plc, Denty argues, the defendant cannot now assert that SB plc is the proper defendant.

The defenses of estoppel and waiver generally are granted only when prejudice can be shown. Thus, although the defense of failure to sue the proper party is indeed considered to be an affirmative defense which must be pled in the defendant's answer, see Bokunewicz v. Purolator Products, Inc., 907 F.2d 1396, 1402 (3d Cir. 1990), the defense is not waived unless prejudice to the plaintiff can be shown. In Bokunewicz, the Third Circuit stated that "failure to [plead the argument that the defendant was the wrong party] is a waiver of the defense unless leave of court is granted to amend under Fed. R. Civ. P. 15." Id. (quoting and adopting district court opinion) (emphasis added). Under Rule 15, "leave shall be given when justice so requires." Fed. R. Civ. P. 15(a). According to the 1937 Advisory Committee Notes, leave to amend can be granted "when the adverse party has not been misled and prejudiced." See also Wright Miller, Federal Practice Procedure § 1278 ("The substance of many unpleaded affirmative defenses may be asserted by pretrial motions, particularly in the absence of prejudice.") Prejudice similarly is an essential element of estoppel. See Walter v. Netherlands Mead N.V., 514 F.2d 1130, 1140-41 (3d Cir. 1975).

Plaintiff has shown no evidence that he was prejudiced by defendant's alleged failure to alert him to its argument that SBC is not the proper defendant in this case. The only prejudice plaintiff has asserted would arise if the court allows defendant to argue that SB plc is the proper defendant without giving plaintiff the opportunity to add SB plc as a defendant. See Plaintiff's Mem. at 29. This I do not propose to do. Rather, plaintiff should

be given leave to add SB plc as a defendant. Because I conclude below, however, that the ADEA does not apply to the plaintiff's failure-to-promote claim, the formality of an amended complaint will be unnecessary.

III. The Extraterritorial Application of the ADEA

The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). Until 1984, it appeared that the ADEA had no extraterritorial reach. All seven of the federal courts of appeals that examined the ADEA as it stood in 1984 have concluded that it did not protect American citizens working abroad for a foreign subsidiary of an American corporation. See Lopez v. Pan Am World Services, Inc., 813 F.2d 1118 (11th Cir. 1987); S.F. De Yoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282 (5th Cir. 1986); Ralis v. RFE/RL, Inc., 248 U.S. App. D.C. 208, 770 F.2d 1121 (D.C. Cir. 1985); Pfeiffer v. Wm. Wrigley Junior Co., 755 F.2d 554 (7th Cir. 1985); Zahourek v. Arthur Young Co., 750 F.2d 827 (10th Cir. 1984); Thomas v. Brown & Root, Inc., 745 F.2d 279 (4th Cir. 1984); Cleary v. U.S. Lines, Inc., 728 F.2d 607 (3d Cir. 1984). These courts applied the well-established presumption against extraterritorial application of federal law. See EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991) ("It is a longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting Foley Brothers, Inc. v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949)). This presumption reflects the principle of international comity, under which the United States should avoid interference with the laws of another sovereign over conduct occurring within its territory. Before 1984, no extraterritorial application of the ADEA would be read into the statute because it did not explicitly provide that it applied to any conduct outside the boundaries of the United States.

In 1984, Congress amended the ADEA to give it a limited extraterritorial reach. As the Supreme Court stated, "The expressed purpose of these changes was 'to make provisions of the Act apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries.'" Arabian, supra, at 259 (quoting S.Rep. No. 467, 98th Cong., 2, reprinted in 1984 U.S.C.C.A.N. 2974, 2975)). This purpose was effected through changes to two provisions. First, Congress amended the definition of

"employee" to provide: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Second, Congress enacted a new subsection of 29 U.S.C. § 623 -- the primary operative provision of the ADEA, which lists prohibited employer practices. The new subsection provides:

> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer. Foley Brothers, Inc. v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949)). This presumption reflects the principle of international comity, under which the United States should avoid interference with the laws of another sovereign over conduct occurring within its territory. Before 1984, no extraterritorial application of the ADEA would be read into the statute because it did not explicitly provide that it applied to any conduct outside the boundaries of the United States.

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> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.
>
> (2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.
>
> (3) For the purposes of this subsection the determination of whether an employer controls a corporation shall be based upon the --

(A) interrelation of operations,
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership or financial control,
of the employer and the corporation.

29 U.S.C. § 623(h).[9] Together, the 1984 amendments establish that the ADEA applies abroad only when (1) the employee is an American citizen and (2) the employer is controlled by an American employer.[10] Non-citizens working outside the United States are not protected because they are not considered "employees." And American citizens working abroad for companies not controlled by American companies are not protected because the practices of such companies are not covered by the ADEA.

B. Whether Denty's Claim Invokes the Extraterritorial Application of the ADEA

Defendant argues that the ADEA does not apply to the employment decisions Denty challenges because they all involved positions outside the United States for an English corporation. Denty asserts that the nature of his

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[9] This subsection was originally codified as 29 U.S.C. § 623(g), creating the anomaly of having two sections so designated. This mistake was corrected in a 1986 amendment.

[10] The 1984 amendments also establish that even a covered entity need not comply with the ADEA if to do so would violate the laws of the country in which it operates. 29 U.S.C. § 623(f)(1). Thus, in Mahoney v. RFE/RL, Inc., 310 U.S. App. D.C. 307, 47 F.3d 447 (D.C. Cir. 1995), the court held that an American corporation operating in Germany did not violate the ADEA by terminating an American citizen due to his age, when its labor contract mandated retirement at age sixty-five. Given "the German laws standing behind such contracts," the employer's "obligations under foreign law [would have] collided with its obligations under" the ADEA if the ADEA applied in this situation. 47 F.3d at 450. According to the court, Congress, "quite sensibly" resolved the potential international conflict of laws "by relieving the employer of liability under the Act." Id.

claim is purely domestic -- involving an American citizen working for an American company in the United States. According to Denty, the site of the workplace is the key factor in determining whether a claim exceeds the extraterritorial reach of the ADEA. Denty argues that the relevant work site was SBC's Philadelphia office, where he worked at the time of the alleged discrimination.

The proposition that the site of the workplace determines the application of the ADEA is indeed supported by the cases Denty cites. The courts which denied the extraterritorial application of the pre-1984 ADEA held that it was the place of the plaintiffs' employment that led to the dismissal of their claims. In those cases it did not matter that the plaintiffs worked for American corporations or that the allegedly discriminatory decisions were made in the United States; the ADEA claims failed merely because the site of plaintiff' employment was outside the United States. Thus, in Wolf v. J.I. Case Co., 617 F. Supp. 858 (D. Wisc.), aff'd 772 F.2d 902 (5th Cir. 1985), the court stated:

Regardless whether the plaintiff worked for an American company or its foreign subsidiary, or both, it is his place of employment which governs the applicability of the ADEA. Pfeiffer, supra, 755 F.2d at 559; Cleary, supra, 728 F.2d at 610.

The plaintiff's allegation that he was supervised and controlled by top management of the defendants based in the United States is not of any legal significance so long as the plaintiff performed his work abroad. The plaintiffs in Cleary, Zahourek, and Thomas were all denied the protection of the ADEA despite the fact that they were directly employed by American companies and not by foreign subsidiaries of the companies.

In sum, the court finds that the plaintiff's work station was outside the United States. As a result, the plaintiff['s] termination claim is not cognizable under the ADEA as it existed at the time he was terminated. 617 F. Supp. at 863. Following the passage of the 1984 amendments, the focus on the plaintiff's work site derives directly from the language of the statute: an "employee" is defined to include United States citizens employed "in a workplace in a foreign country." 29 U.S.C. § 630(f).

The proposition that the site of the workplace determines the applicability of the ADEA -- a proposition in which I acquiesce -- does not, however, lead to the conclusion advanced by Denty. The employment decisions at issue here involve Denty's application for positions outside the United States. The relevant work site is the location of these positions, not the location of Denty's employment at the time of the alleged discrimination. In

Lopez, supra, the plaintiff was an American citizen who, while in the United States, applied for work in Venezuela. The Eleventh Circuit held that the ADEA did not protect the plaintiff in this situation because "the work station for appellant's job would have been Caracas, Venezuela." 813 F.2d at 1120 (emphasis added). Here, Denty's workplace would have been England or Australia. The relevant work site in a case of alleged discrimination against a job applicant is the location of the position for which the plaintiff applied. Denty attempts to distinguish Lopez on the ground that it involved an "original application" for employment and not, as in the present case, an application for promotion from within a company. Plaintiff's Mem. at 19 n.13. Nothing in the text of the ADEA, however, supports a distinction between applications for a promotion and applications for a new job.

Denty presents a series of hypotheticals that purportedly demonstrate the absurdity of not applying the ADEA to foreign-based work sites of foreign companies. If the ADEA does not apply, Denty asserts, a foreign company with an office in the United States could lawfully discriminate against its American employees on the basis of age by transferring them to the company's foreign office, where, under the laws of the foreign state, the employees could be dismissed on the basis of age. This hypothetical method of evading the ADEA has already been considered by two courts, which have concluded that the problem can be addressed without redefining the definition of a workplace. In Wolf, the court stated, "An exception is made when it is necessary to prevent a transparent evasion of the Act, as where an employer transfers an employee abroad for a short period of time for the purpose of avoiding the Act's coverage." 617 F. Supp. at 861. Similarly, in Pfeiffer, the Seventh Circuit stated:

All this is not to say, however, that if Pfeiffer had worked for Wrigley in the United States, and Wrigley to get around the Age Discrimination in Employment Act had moved him abroad in his last day (or week, or month -- we need not explore the outer bounds of the limiting principle sketched here) and then fired him, it would be immune from liability under the Act. In that hypothetical case Pfeiffer's relevant work station would be (we may assume, without deciding) the United States. 755 F.2d at 559. Even if these courts are mistaken that such an exception can be read into the statute, the problem is one to be fixed by Congress, which limited the extraterritorial application of the ADEA. In any event, the problem Denty posits is not presented by his case, the ADEA is clear that it does not apply to employment abroad with foreign-controlled employers, and I need not address the hypothetical failings of the statute.

B. Whether SB plc Is Controlled by An American Employer

Because the positions Denty sought were outside the United States, the ADEA only applies if SB plc can be considered to be controlled by an American employer. The ADEA declares that its prohibitions apply when an "employer controls a corporation whose place of incorporation is in a foreign country." 29 U.S.C. § 623(h)(1). Conversely, the ADEA does not apply "where the employer is a foreign person not controlled by an American employer." 29 U.S.C. § 623(h)(2). Denty does not dispute the fact that SB plc was incorporated in England. Nor does Denty dispute the fact that SB plc is the 100% owner of SBC, a fact that makes it extremely difficult to believe that SB plc is controlled by SBC.

Nonetheless, applying the four-factor test established by the ADEA, Denty argues that SB plc and SBC are indistinguishable and should be considered a "single employer." The "single employer" inquiry advocated by Denty is not the correct inquiry in this case. It derives from cases in which courts have considered whether the number of employees of two nominally distinct entities can be aggregated in determining whether a firm employs the minimum number of employees necessary to be covered by the National Labor Relations Act and, by extension, the ADEA. See Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 13 L. Ed. 2d 789, 85 S. Ct. 876 (1965) (applying the single employer theory to a case arising under the NLRA); Rogers v. Sugar Tree Products, Inc., 7 F.3d 577, 582-84 (7th Cir. 1993) (applying the single employer theory to an ADEA case). In this case, the issue is not whether SB plc and SBC should be considered a single employer but whether Denty sought employment with an employer "controlled" by an American firm. Nonetheless, the four-factor test used to determine whether two firms should be considered a single employer is identical to the test specified by the ADEA for "the determination of whether an employer controls a corporation." 29 U.S.C. § 623(h)(3). These factors are "interrelation of operations," "common management," "centralized control of labor relations," and "common ownership or financial control." Id.

Plaintiff has presented substantial evidence as to all these factors. Operations at SB plc and SBC are highly integrated, organized by the type of work performed and not by location; thus, SmithKline Beecham Pharmaceuticals operates as a unified corporate division in England, in the United States, and elsewhere. Deposition testimony further reveals the interrelationship between the two firms in that SBC employees such as Denty

report directly to SB plc employees. Moreover, the two corporations have common management -- one CEO, whose offices are in England. Labor relations are similarly centralized -- directed by a single Director and Vice-President, whose office is also in England. One annual report is prepared for the two entities, in which revenues are reported on a consolidated basis. See Plaintiff's Ex. 21. The annual report speaks of the corporation in singular terms, as an English corporation.

While all of this suggests that SmithKline Beecham's American and English operations overlap to a great extent, it in no way suggests that SB plc is controlled by its American subsidiary. On the contrary, the evidence garnered by Denty leads to the unsurprising conclusion that the American subsidiary is controlled by its English parent. While the two entities have interrelated operations and common management, the common management is focused in England, at the corporation's primary headquarters. There may be central control of the two entities' labor relations, but again control lies in the English entity. Ownership too lies entirely with the English corporation, which wholly owns its American subsidiary.

Denty has produced no evidence to establish a genuine dispute of fact as to the control of SB plc. He can only claim that he applied for positions outside the United States for an English corporation. The ADEA has no application in this situation, and summary judgment is therefore granted to defendant on Denty's failure-to-promote claim.

IV. The Extraterritorial Application of the PHRA

Although the ADEA explicitly provides for a limited any extraterritorial reach, the PHRA makes no provision at all for extraterritorial application. As discussed above, federal courts will only attribute to Congress an intent to apply federal law outside the United States when Congress has very explicitly expressed such an intention. The rationale for this reluctance -- respect for the sovereignty of other nations within their territories -- should make courts even more reluctant to apply state law outside the boundaries of the United States. Great mischief would be accomplished by allowing each state to regulate the conduct of individuals abroad. Without any evidence that Pennsylvania intended to apply the PHRA to decisions by an English corporation regarding positions in England -- and no such evidence has been offered -- this court concludes that the PHRA does not apply to the employment decisions at issue in this case.

Denty has not argued that the PHRA should be applied

extraterritorially. Instead, Denty argues, as discussed above, that his complaint is of a purely domestic nature, in that at the time of the alleged discrimination he was working in the United States for an American employer. As I concluded above, this argument ignores the crucial facts that the positions Denty allegedly was denied on the basis of age were outside the United States, for an English employer. Because the complaint seeks to apply the PHRA extraterritorially, the claim under the PHRA must be dismissed.[11]

Conclusion

As discussed above, Denty's failure-to-promote claims must be dismissed because the ADEA and the PHRA do not cover decisions regarding employment outside the United States for a foreign-run company. An appropriate order dismissing these claims accompanies this memorandum.

ORDER

Upon consideration of the defendant's motion for summary judgment on Counts I and III of the plaintiff's complaint, and pursuant to the attached memorandum, it is hereby ORDERED that the motion is GRANTED. Counts I and III are hereby DISMISSED.

/s/ Pollak, J.

November 6, 1995

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[11] Pennsylvania choice-of-law rules similarly lead to the conclusion that the conduct of an English corporation in filling positions in England and Australia is not governed by Pennsylvania law. Pennsylvania has adopted choice-of-law principles that it describes as "a flexible rule which permits analysis of the policies and interests underlying a particular issue before the court." Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796, 805 (Pa. 1964). England and Australia clearly have strong interests in regulating the employment relations within their borders. In contrast, Pennsylvania's interest relates only to its interest in protecting American applicants for the positions at issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARLAND DENTY	:	
	:	Civil Action
Plaintiff,	:	No. 93-6978
v.	:	
	:	
SMITHKLINE BEECHAM CORP.,	:	
	:	
Defendant.	:	

ORDER

AND NOW this 10 day of May, 1996, upon consideration of Plaintiff's Motion for Certification to Allow an Immediate Appeal Pursuant to 28 U.S.C. § 1292(b), Plaintiff's Motion for Certification which defendant does not oppose (see Stipulation of March 29, 1996) is hereby GRANTED and the Order of November 6, 1995 is hereby CERTIFIED to the Court of Appeals as involving a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation, and therefore appropriate for immediate review pursuant to 28 U.S.C. § 1292(b).

The question to be certified is whether the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act are applicable

to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, PA, in the employ of a foreign corporation not controlled by an American corporation, where the promotional opportunity is a position with the same foreign corporation outside the United States?

/s/ Louis H. Pollak
Louis H. Pollak

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

June 3, 1996
A-123

No. 96-8030

GARLAND DENTY, Petitioner
v.
SMITHKLINE BEECHAM CORPORATION
(E.D. of Pa. Civil No. 93-cv-06978 (LHP))

Present: Becker, Roth and Sarokin, Circuit Judges.

1. Petition for permission to appeal under 28 U.S.C. Section 1292(b).

2. Response by Respondent to the Petition for permission to appeal.

/s/ Anthony Infante
Anthony Infante 597-3137
Deputy Clerk

ORDER

The foregoing petition is granted. The question accepted for certification is the following:

Whether the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act are applicable to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, PA, in the employ of a United States subsidiary controlled by a foreign parent corporation not itself controlled by an American corporation, where the

promotional opportunity is a position with the foreign corporation outside the United States.

Dated: June 21, 1996

By the Court,

LD/cc: Ronald H. Surkin, Esq.
Alexander A. DiSanti, Esq.
Nancy C. DeMis, Esq.
L. Keith Lipman, Esq.
Steven B. Fierson, Esq.

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Circuit Judge